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8 IN THE UNITED STATES DISTRICT COURT
9 FOR THE EASTERN DISTRICT OF CALIFORNIA

10 RAYMOND H. DENTON, JR.,

11 Petitioner,

No. CIV S-03-1558 RRB JFM P

12 vs.

13 SILVIA GARCIA, Warden,

14 Respondent.

ORDER

15 _____/
16 Petitioner, a state prisoner proceeding pro se, has timely filed a notice of appeal of
17 this court's December 18, 2007 denial of his application for a writ of habeas corpus. Petitioner
18 has also filed an application to proceed in forma pauperis on appeal, a motion for appointment of
19 counsel and a DNA expert, and an application for a certificate of appealability pursuant to 28
20 U.S.C. § 2253(c).

21 A certificate of appealability may issue under 28 U.S.C. § 2253 "only if the
22 applicant has made a substantial showing of the denial of a constitutional right." 28 U.S.C.
23 § 2253(c)(2). The court must either issue a certificate of appealability indicating which issues
24 satisfy the required showing or must state the reasons why such a certificate should not issue.
25 Fed. R. App. P. 22(b).

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For the reasons set forth in the magistrate judge's October 11, 2007 findings and recommendations, petitioner has not made a substantial showing of the denial of a constitutional right. Accordingly, petitioner's request for a certificate of appealability will be denied.

There currently exists no absolute right to appointment of counsel in habeas proceedings. See Nevius v. Sumner, 105 F.3d 453, 460 (9th Cir. 1996). However, 18 U.S.C. § 3006A authorizes the appointment of counsel at any stage of the case "if the interests of justice so require." See Rule 8(c), Fed. R. Governing § 2254 Cases. In the present case, the court does not find that the interests of justice would be served by the appointment of counsel. Petitioner's motion for appointment of counsel will therefore be denied. Petitioner's motion for appointment of a DNA expert will also be denied.

The Federal Rules of Appellate Procedure provide as follows:

[A] party who has been permitted to proceed in an action in the district court in forma pauperis . . . may proceed on appeal in forma pauperis without further authorization unless . . . the district court shall certify that the appeal is not taken in good faith or shall find that the party is otherwise not entitled so to proceed

Fed. R. App. P. 24(a). Petitioner was granted leave to proceed in forma pauperis in this court at the start of these proceedings. This court has not certified that petitioner's appeal is not taken in good faith or otherwise found that petitioner is not entitled to proceed in forma pauperis.¹ For that reason, petitioner's application to proceed in forma pauperis is unnecessary.

In accordance with the above, IT IS HEREBY ORDERED that:

1. Petitioner's January 15, 2008 request for a certificate of appealability is denied;

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¹ There is no inconsistency in denying a certificate of appealability while declining to certify that appeal is not taken in good faith for purposes of the in forma pauperis statute. See Gardner v. Pogue, 558 F.2d 548, 550-551(9th Cir. 1977) (comparing standards for issuance of certificate of probable cause and for allowing an appeal to proceed in forma pauperis). Since the test for a certificate of appealability is "more demanding" than that for a certificate of appealability, see Williams v. Calderon, 83 F.3d 281, 286 (9th Cir. 1996), the rationale of Gardner is still applicable.

2. Petitioner's January 15, 2008 motion for appointment of counsel and a DNA expert is denied;

3. Petitioner's January 15, 2008 application to proceed in forma pauperis on appeal is denied as unnecessary; and

4. The Clerk of the Court is directed to process petitioner's appeal to the United States Court of Appeals for the Ninth Circuit.

DATED: 2/12/2008

/s/ Ralph R. Beistline
UNITED STATES DISTRICT JUDGE